Filed 6/28/12 P. v. LeBlanc CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROYALE LEBLANC et al., Defendants and Appellants.	A126458 (San Francisco County Super. Ct. Nos. 206609-02, 206609-01)

In this gang-related homicide case, defendants Royale LeBlanc and Jonathan Johnston were tried together in connection with the stabbing death of Carlos Urzua. The jury convicted LeBlanc of first degree murder (Pen. Code,[1] § 187, subd. (a)), second degree robbery (§ 211), and participation in street terrorism (§ 186.22, subd. (a)). The jury also found that LeBlanc committed the murder and robbery for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) As to Johnston, the jury found he was not guilty of robbery, but convicted him of second degree murder and participation in street terrorism. The jury also found that Johnston committed the murder for the benefit of a criminal street gang, and Johnston admitted that he was on bail at the time of the offenses.

On appeal, defendants jointly and individually raise a multitude of errors, including instructional error, wrongful admission of evidence, and cumulative error. We affirm.

[1] All further undesignated statutory references are to the Penal Code.

I.
FACTUAL AND PROCEDURAL BACKGROUND

We summarize the underlying facts, viewing the evidence as a whole and, as we must, in the light most favorable to the prosecution. (*People v. Staten* (2000) 24 Cal.4th 434, 460.) In the early morning hours of November 25, 2006, defendants were driving through San Francisco's Mission Street corridor. Defendants were members of the Norteño street gang within a Mission-specific subset known as Loco North Sides or LNS. Johnston, known as Savage in English and Sabioso in Spanish, was in the driver's seat. LeBlanc, known as Crazy Teño, short for Crazy Norteño, was in the front passenger seat. Riding in the back seat were Joel Lopez, a 16-year-old Norteño "wan[na] . . . be," whom defendants had picked up earlier that night, and an unidentified man dressed in black.

After defendants and their passengers had been driving around for about 30 minutes, they spotted a car turning onto Alabama Street. Johnston followed the car and parked behind it. The victim, Carlos Urzua, who was wearing a green shirt, got out of the car and began to walk up the steps to his house. Lopez testified that when Johnston saw Urzua exit the car, Johnston commanded, " 'He's a south side, he's a south side, go get him.' " Lopez said that Johnston further directed, " 'That's a scrap. That's a scrap. Go get him. Get out of the car.' " "Scrap" is a derogatory term for a member of the rival Sureño gang. According to Lopez, LeBlanc got "hyped up" by the idea and said, " 'Let's go get him, let's go get him.' " On Johnston's instruction, the three passengers got out of the car. Johnston drove away, but returned several minutes later.

Urzua was not a Sureño, and he had never been known by his family and friends or a local gang expert to have been in any way affiliated with street gangs. Rather, he was a 28-year-old building maintenance supervisor, who happened to live with his family in an area claimed by the Norteños. On the night in question, Urzua had been out with some female friends, one of whom had driven him home.

From inside the car, Urzua's friends, Maricela Ibarra and Eva Perez, saw between three and five men chase Urzua up the steps and attack him. Neither Ibarra nor Perez

could see the faces of the attackers clearly. As Ibarra called 911, she and Perez saw Lopez and another man approach their car from behind. Feeling threatened, Perez told Ibarra to drive away. As she drove away, Ibarra continued talking to the 911 operator.

Meanwhile, LeBlanc and the unknown passenger cornered Urzua at the top of the steps to his house. Lopez, who was on the sidewalk, heard LeBlanc ask Urzua, in English, " 'Where you from, where you from,' " a gang phrase that usually precedes some type of violence. Urzua responded, in Spanish, " 'I'm not from nowhere.' " Lopez also heard LeBlanc and the unknown passenger demand money from Urzua. It appeared to Lopez that Urzua then "handed something" to LeBlanc. Lopez testified that the unidentified man pulled out a knife and gave it to LeBlanc. Lopez saw LeBlanc make repeated stabbing motions toward Urzua. Severely wounded, Urzua pushed his way past his attackers and fled down the steps and ran around the corner.

In the course of the stabbing, LeBlanc sustained a knife wound on the webbing between his right thumb and forefinger. The wound was described as an "offensive" wound, which presumably occurred when LeBlanc's hand slipped down onto the blade. Lopez saw LeBlanc take off his white shirt and wrap his hand with it to stop the bleeding. LeBlanc then put on the unidentified man's black shirt. Johnston returned to the scene shortly thereafter, picked up LeBlanc and the unknown man, and drove away; Lopez then walked to a bus stop and took a bus home.

Several minutes later, Ibarra drove back to Urzua's house. The car and the men were now gone; Urzua was lying on the steps to his house, bleeding profusely. A neighbor rousted Urzua's father and brother from inside the house. The police and an ambulance arrived shortly thereafter. At that point, Urzua was still alive but unconscious. Paramedics transported Urzua to the hospital, where he died later that night. The cause of death was multiple stab wounds; Urzua was stabbed 18 times.

Approximately an hour after the stabbing, while the police were investigating the scene, Johnston and LeBlanc drove around the block. Ibarra, who was still at the scene, recognized the distinctive, mottled gray and white car, and she pointed it out to the police. The police followed the car and pulled Johnston and LeBlanc over approximately

four blocks away. The officers saw blood on the passenger seat, on an oil container, and on an empty cigarette carton. In the back of the car, the officers found LeBlanc's discarded sweater and pants, which were also stained with blood. The officers observed blood on LeBlanc's shoe and shorts, as well as a fresh offensive knife wound on his hand. DNA tests confirmed that the blood on LeBlanc's right shoe and shorts was attributed primarily to Urzua and partially to LeBlanc.

Lopez's fingerprint, which the police used to connect him to the crime, was found on the car. Also, Lopez's cell phone was found at the crime scene in a trail of blood. Fearing Norteño retaliation, and because he was fleeing the police for an unrelated crime, Lopez did not report the murder. Fear of retaliation also prevented Lopez from testifying at the preliminary hearings, and the trial court jailed him for contempt. Lopez, however, testified at trial, and described the respective roles of Johnston and LeBlanc in the charged offenses.

At the time of his arrest, LeBlanc had two cell phones in his pocket. After obtaining Urzua's cell phone number, an officer dialed that number, and one of the phones that had been in LeBlanc's possession rang. Initially, LeBlanc told police his name was Casanova Bentley.

Defendants were charged in a consolidated, first amended felony complaint with murder (§ 187, subd. (a), count I) and second degree robbery (§ 211, count II). The felony complaint also included enhancements, alleging that defendants committed the crimes for the benefit of a street gang (§ 186.22, subd. (b)(1)(C)). Additionally, both defendants were charged with street terrorism (§ 186.22, subd. (a), count III). As to Johnston, it was alleged that he committed the three charged offenses while on bail for an unrelated felony offense (§ 12022.1).

The jury convicted LeBlanc of first degree murder, second degree robbery, and street terrorism, and found the gang allegations true regarding count I (murder) and count II (robbery). LeBlanc was sentenced to 25 years to life for murder, consecutive to a five-year term for robbery and a three-year term for street terrorism, together with 10

years for the gang enhancement.[2] Johnston was convicted of second degree murder and street terrorism. The jury also found the gang allegation true regarding count I (murder); Johnston admitted the on-bail allegations. Johnston was sentenced to 15 years to life for murder, with a concurrent three-year term for street terrorism, plus 10 years for the gang enhancement.[3]

II.
DISCUSSION

A. Jury Instruction Issues

Defendants challenge the way in which the jury was instructed regarding accomplice liability and the way in which it was instructed regarding the believability of a witness who has provided willfully false testimony. On appeal, we determine de novo whether a jury instruction correctly stated the law, applying our independent judgment. (*People v. Posey* (2004) 32 Cal.4th 193, 218; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) We consider the instructions given as a whole, not in isolation. (*People v. Ramos, supra,* at p. 1088.) We assume that jurors are intelligent people capable of understanding and correlating all the jury instructions that are given. (*Ibid.*; *People v. Ayers* (2005) 125 Cal.App.4th 988, 997.)

---

[2] The trial court stayed the robbery sentence pursuant to section 654. The trial court also stayed the 10-year gang enhancement (§ 186.22, subd. (b)(1)) as to counts I and II. The abstract of judgment, however, ties the gang enhancement only to the robbery (count II) and not the murder (count I). To the extent the abstract does not accurately reflect the verdict of the jury and the sentence imposed by the trial court, we remand for correction of this clerical error.

[3] As noted by the Attorney General, Johnston's abstract of judgment fails to include the gang enhancement that was found true by the jury and fails to include the pendant 10-year term imposed by the trial court. To the extent the abstract does not accurately reflect the verdict of the jury and the sentence imposed by the trial court, we remand for correction of this clerical error.

1. CALCRIM No. 400 (Aiding and Abetting; Natural and Probable Consequences)

Defendants contend the court erred because, despite its decision to omit any instructions on natural and probable consequences, it inadvertently included in the general jury instruction on liability for aiding and abetting (CALCRIM No. 400) language that refers to natural and probable consequences liability. Defendants assert that because the court instructed on natural and probable consequences liability, it was required also to instruct on the basic elements of such liability and properly define the intended lesser target crimes. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 269-270 (*Prettyman*).)

a. Background

At trial, the prosecution submitted a list of proposed instructions that included, inter alia, CALCRIM No. 400, general principles on aiding and abetting, together with CALCRIM No. 401, aiding and abetting/intended crimes. The prosecution did not, however, request CALCRIM Nos. 402 and 403, which define the natural and probable consequences doctrine vis-à-vis target and nontarget offenses or otherwise request any specific reference to the natural and probable consequences doctrine in CALCRIM No. 400. Rather, defense counsel for Johnston requested that CALCRIM No. 400 be modified to remove the reference to an aider and abettor as being "equally guilty"[4] and that it be replaced with the following language: "An aider and abettor can be guilty only of the crimes that he or she intends the perpetrator [to] commit, or any other crime that is the natural and probable consequence of the intended crime." Johnston's counsel also requested that the jury be instructed with CALCRIM No. 402, which defined the natural and probable consequences doctrine where both target and nontarget offenses are

[4] The instruction was revised in the 2010 version of CALCRIM No. 400 to omit the word "equally." (Judicial Council of Cal., Criminal Jury Instructions (2011).) All further references herein to CALCRIM No. 400 will be to the former version, CALCRIM No. 400 (2009), unless otherwise indicated. On appeal, defendants do not challenge the inclusion of the word "equally" in the instruction used at trial.

charged, and with CALCRIM No. 403, which defined the natural and probable consequences doctrine where only nontarget offenses are involved.

At the instructional conference, the court noted that it would have expected the prosecutor to ask for natural and probable consequences instructions, but was "surprised" by the defense request, as these instructions "provide[d] an alternative theory of liability." The prosecutor stated that he thought CALCRIM No. 402 would be appropriate in the limited situation where the target offense is assault with a knife and the result is second degree murder. Defense counsel argued that the relevant inquiry was whether the natural and probable consequences of a simple assault are that someone is going to be stabbed to death. The court stated that it was "not inclined" to instruct on CALCRIM No. 402. The court did not strike the "equally guilty" language in CALCRIM No. 400, but agreed to add the language requested by defense counsel.

At the conclusion of trial, the court instructed the jury with the following version of CALCRIM No. 400, aiding and abetting/general principles: "A person may be guilty of a crime in two ways: [¶] One, he may have directly committed the crime. I will call that person the perpetrator. [¶] Or two, he may have aided a perpetrator who directly committed the crime. [¶] A person may be equally guilty of the crime whether he committed it personally or aided and abetted the perpetrator who did commit the crime. [¶] An aider and abettor can be guilty only of the crimes he intends the perpetrator commit. [¶] *Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, the person may also be found guilty of other crimes that occurred during the commission of the first crime.*" (Italics added.)

The court also gave CALCRIM No. 401, aiding and abetting an intended crime, but did not instruct the jury with either CALCRIM No. 402, natural and probable consequences, target/nontarget offenses or CALCRIM No. 403, natural and probable consequences, nontarget offenses only.

b. Legal Principles

"Both aiders and abettors and direct perpetrators are principals in the commission of a crime. . . . [S]ection 31 defines 'principals' as '[a]ll persons concerned in the

commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission. . . .' (See . . . § 971 ['all persons concerned in the commission of a crime, who by the operation of other provisions of this code are principals therein, shall hereafter be prosecuted, tried and punished as principals. . . .'].)" (*People v. Calhoun* (2007) 40 Cal.4th 398, 402.)

A defendant can be liable as an aider and abettor in two ways. "First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

The natural and probable consequences doctrine applies when "an accomplice assists or encourages a confederate to commit one crime, and the confederate commits another, more serious crime (the nontarget offense)." (*Prettyman, supra,* 14 Cal.4th at p. 259.) When the evidence triggers the application of the natural and probable consequences doctrine to an aider and abettor, "the trier of fact must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime. But the trier of fact must also find that (4) the defendant's confederate committed an offense other than the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Id.* at p. 262, italics & fn. omitted; see also *People v. Gonzales* (2001) 87 Cal.App.4th 1, 8.) The question is not the defendant's subjective state of mind, but rather, "whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant. [Citations.]" (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 (*Nguyen*).)

It is well established that "[f]or a criminal act to be a 'reasonably foreseeable' or a 'natural and probable' consequence of another criminal design it is not necessary that the collateral act be specifically planned or agreed upon, nor even that it be substantially certain to result from the commission of the planned act. For example, murder is generally found to be a reasonably foreseeable result of a plan to commit robbery and/or burglary despite its contingent and less than certain potential. [Citations.]" (*Nguyen, supra,* 21 Cal.App.4th at p. 530.) However, "the collateral criminal act [must be] the ordinary and probable effect of the common design," rather than "a fresh and independent product of the mind of one of the participants, outside of, or foreign to, the common design. [Citation.]" (*Id.* at p. 531.) With these principles in mind, we now turn to the issues raised on appeal.

c. Analysis

Defendants argue that when the court gave CALCRIM No. 400, it erroneously included the last paragraph of the instruction, which addressed the natural and probable consequences doctrine, without further identifying and explaining the basis for expanded accomplice liability in this case. According to Johnston, the partial instruction on natural and probable consequences lightened the prosecution's burden of proof. LeBlanc adds that the instruction erroneously gave the jury "an unrestricted option to convict [him] of the charged crimes simply because he aided an uncharged one [i.e., assault]."

Notwithstanding the fact that Johnston requested the challenged language and that neither defendant objected to this language, we agree that the final paragraph of CALCRIM No. 400 implicates the natural and probable consequences doctrine. We also conclude that the trial court erroneously included the final paragraph since it had announced that it would not instruct the jury about the natural and probable consequences pursuant to CALCRIM Nos. 402 and 403. Under these circumstances, however, the last paragraph of CALCRIM No. 400 was "an 'abstract' instruction, i.e., 'one which is correct in law but irrelevant[.]' [Citation.]" (*People v. Rowland* (1992) 4 Cal.4th 238, 282.) "It is error to give an instruction which, while correctly stating a principal of law, has no

application to the facts of the case. [Citation.]" (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

Nonetheless, giving an irrelevant or inapplicable instruction is generally " 'only a technical error which does not constitute ground for reversal.' [Citation.]" (*People v. Cross* (2008) 45 Cal.4th 58, 67.) "A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]" (*Id.* at pp. 67-68.) In evaluating such a challenge, we must consider whether it is reasonably likely that the trial court's instructions caused the jury to misapply the law or to interpret the instructions in a way that violated the defendant's rights. (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) In doing so, we must consider the entire charge to the jury, not just one particular instruction or part of an instruction. (*Ibid.*) Relying on *Prettyman, supra,* 14 Cal.4th 248, defendants argue that reversal is required. In *Prettyman*, the California Supreme Court held that when the theory of the prosecution is aiding and abetting liability under the " 'natural and probable consequences' " doctrine, the trial court must identify and describe the target crimes that the defendant might have assisted or encouraged. (*Id.* at pp. 254, 267-268.) This aids the jury in determining whether the crime charged was a natural and probable consequence of some other criminal act and eliminates the risk that the jury will engage in uninformed speculation with regard to what type of conduct is criminal. (*Id.* at pp. 254, 267.) However, because a conviction may not be based upon the jury's generalized belief that the defendant intended to assist and/or encourage unspecified " 'nefarious conduct,' " the target crime must be identified. (*Id.* at p. 268.) Further, to "trigger application of the 'natural and probable consequences' doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed." (*Id.* at p. 269.)

Prettyman concluded that the failure to instruct adequately on the target crime created an ambiguous instruction because the jury could engage in unguided speculation, but that such ambiguity was not reversible error unless there was " 'a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the

[federal] Constitution." (*Prettyman, supra,* 14 Cal.4th at p. 272.) In *Prettyman*, the prosecution's theory of the case was that the aider and abettor assisted in the charged crime, rather than the target crime, and no arguments were made to the jury on the " 'natural and probable consequences' " theory. Thus, it was likely the jury did not rely on the theory but convicted the defendant as a simple accomplice to murder, rather than as an accomplice to a lesser criminal act of which the murder was a natural and probable consequence. (*Id.* at pp. 272-273.)

Furthermore, *Prettyman* determined there was little likelihood the jury misapplied the doctrine because there was no evidence of any possible target offense aside from the killer's assault on the victim, thus there was no evidence the accomplice aided and abetted any noncriminal conduct. (*Prettyman, supra*, 14 Cal.4th at p. 273.) Finally, *Prettyman* found no state constitutional violation because the error was harmless, as it was not reasonably likely the result would have been different in the absence of the trial court's instructional error. (*Id.* at p. 274.)

The same reasoning applies here and shows that the jury did not engage in unguided speculation about "nefarious" conduct. Although the court erred in failing to define the target offense, the error was harmless under both federal and state constitutional law.

As to Johnston, the prosecutor argued that he aided and abetted in the underlying crimes. Indeed, with the exception of Johnston's counsel, none of the parties referenced the natural and probable consequences doctrine in their arguments to the jury. Johnston's trial counsel urged the jury not find Johnston guilty of murder if it found he merely aided in a simple assault. The gist of Johnston's position was that it was not reasonably foreseeable for an assault to escalate into murder. We disagree.

Contrary to Johnston's suggestion, murder is generally found to be a reasonably foreseeable result in instances of gang confrontations. (See *People v. Gonzales*, *supra*, 87 Cal.App.4th at pp. 10-11 [fatal shooting during gang-related fistfight was natural and probable consequence of fistfight]; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1056 [shooting of rival gang member during retreat from fight was natural and probable

consequence of gang fight in which defendant wielded a chain]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376 [defendant's punching of victim during gang confrontation foreseeably led to fatal shooting of victim by fellow gang member]; *People v. Godinez* (1992) 2 Cal.App.4th 492, 499-500 [fatal stabbing of rival gang member either during or after fistfight was natural and probable consequence of fistfight]; see also *People v. Montano* (1979) 96 Cal.App.3d 221, 226, superseded by statute on another ground as noted in *People v. Gibbs* (1983)145 Cal.App.3d 794, 797 [defendant's aiding and encouragement of battery on victim foreseeably led to shooting of victim by fellow gang members].)

In the instant case, Lopez testified that when Johnston saw Urzua, he believed Urzua was a rival gang member and ordered his subordinates as follows: " 'That's a scrap. That's a scrap. Go get him. Get out of the car.' " At the very least, the command to "[g]o get him," was a direction to assault Urzua. Indeed, Johnston's counsel urged the jury to adopt this interpretation, arguing that Johnston's liability should be limited: "The intention was to beat him up, like a lot of the witnesses talked about [what] happens with gang members, particularly younger ones. How is he supposed to know that's going to lead to someone's death?"

Though Johnston tries to distance himself from Urzua's murder, the issue is not whether he actually foresaw the alleged nontarget crime (i.e., murder), but whether, judged objectively, it was reasonably foreseeable. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133.) Here, the effect of Johnston's instigation of gang violence, which inspired a confederate to stab the victim, was "ordinary and probable." (*Nguyen, supra,* 21 Cal.App.4th at p. 531.) Thus, even had the jury been instructed on the definition of an assault with a deadly weapon or simple assault, there is no reasonable probability the result would have been different if the purported target offense had been defined. (*Prettyman, supra,* 14 Cal.4th at p. 273*; People v. Watson* (1956) 46 Cal.2d 818, 836.) On this record, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

As to LeBlanc, his defense was essentially that he was merely present at the scene. He argues at length that the erroneous instruction was not harmless in light of the evidence. According to LeBlanc, the evidence at trial permitted reasonable doubt in four different scenarios, to wit: (1) whether he was the perpetrator of the homicide; (2) if he was not the perpetrator, whether he intended or aided and abetted murder; (3) if he aided only an assault, whether the stabbing death was a natural and probable consequence; and (4) whether he committed or aided a robbery.

In his efforts to demonstrate reversible instructional error, LeBlanc is, in reality, challenging the sufficiency of the evidence supporting his convictions for murder and robbery. He argues at length that Lopez was not credible, and presents alternate, less incriminating theories to explain his possession of the victim's phone (i.e., he merely picked it up from the ground) and his being covered in blood (i.e., the victim brushed against him as he fled the scene). LeBlanc's argument relies on the unsupported premise that someone else stabbed Urzua. The jury clearly did not accept this theory and drew reasonable inferences from the evidence in order to arrive at its verdict.

Specifically, the evidence established that LeBlanc had an offensive knife wound and was awash in blood at the time of his arrest. Lopez testified that the unidentified man handed LeBlanc the knife, and LeBlanc was the only person to stab Urzua. Lopez heard LeBlanc and the unidentified man demand money from Urzua. Lopez then saw Urzua hand something to LeBlanc. LeBlanc's guilt of murder and robbery was clearly personal and not derivative. Thus, we are convinced that any error in failing to further instruct on the natural and probable consequences was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The error was also harmless under state law. (*Prettyman, supra,* 14 Cal.4th at p. 274*; People v. Watson, supra,* 46 Cal.2d at p. 836.)

2. CALCRIM No. 226 (False Testimony)

LeBlanc requested that the trial court give CALJIC No. 2.21.2, a traditional instruction informing the jury to distrust in its entirety the testimony of a witness if it concludes that a portion of the witness's testimony was false. The court elected instead to give the parallel instruction from CALCRIM No. 226. LeBlanc contends that the choice of CALCRIM No. 226 was reversible error; Johnston joins in the argument.

CALJIC No. 2.21.2 states, "A witness, who is willfully false in one material part of his or her testimony, *is to be distrusted* in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." (Italics added.) The portion of CALCRIM No. 226 addressing this issue states, "If you decide that a witness deliberately lied about something significant in this case, *you should consider not believing anything that witness says.* Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest." (Italics added.) LeBlanc contends he was prejudiced because the CALCRIM instruction does not contain the admonition that the witness's testimony " 'is to be distrusted.' "

LeBlanc insists that his concern is not with the "precision of wording," but with the absence of "necessary *direction* to the jury." According to LeBlanc, deliberate liars cannot be trusted "as a matter of law," therefore the trial court is obligated upon request to direct the jury to distrust them. He contends the CALJIC statement that a witness's testimony " 'is to be distrusted' " requires a specific action whereas the CALCRIM language does not.

In *People v. Lawrence* (2009) 177 Cal.App.4th 547, 553-556 (*Lawrence*), the court rejected a similar challenge to CALCRIM No. 226. There, the defendant claimed that "the CALJIC instructions obligate the jury to distrust—hence, disbelieve—a false witness . . . whereas the CALCRIM instructions merely give jurors the option of disbelieving, without telling them that the policy of the law is that the witness *should* be disbelieved unless parts of his or her testimony seem to be true." (*Lawrence* at p. 553.)

In rejecting the claim of instructional error, the court traced the " 'distrust' " language contained in CALJIC No. 2.21.2 and its predecessor, former CALJIC No. 2.21, as having its source in "Code of Civil Procedure former section 2061, subdivision 3, which required jurors to be instructed ' "[t]hat a witness false in one part of his testimony is to be distrusted in others." [Citation.]' [Former] Code of Civil Procedure section 2061 was repealed in 1965, effective January 1, 1967. Although the 'distrust' language was not carried over into a different code section, the cautionary instructions on evidence and witnesses that [former] Code of Civil Procedure section 2061 listed were derived from the common law and so the repeal was seen as having 'no effect on the giving of the instructions contained in the section. . . .' (Cal. Law Revision Com. com., 21A West's Ann.Code Civ. Proc. (2007 ed.) foll. § 2061, p. 608; see *People v. Hampton* (1999) 73 Cal.App.4th 710, 722.)" (*Lawrence* at p. 554.)

That said, the *Lawrence* court expressly rejected the notion "that the wording of the jury charge is immutable." (*Lawrence, supra,* 177 Cal.App.4th at p. 554.) In so ruling, the court explained that it had "previously rejected the argument that CALJIC instructions 'serve as the benchmark by which to adjudicate the correctness of CALCRIM instructions,' observing that 'CALCRIM instructions are now "viewed as superior" to CALJIC instructions. [Citation.]' (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1188.)" (*Ibid.*) The court further explained that it had "been unpersuaded that semantic differences between CALCRIM No. 226 and CALJIC No. 2.21.2 are even material, let alone prejudicial" [citation] . . . .' " (*Ibid.*)

Despite LeBlanc's efforts to distinguish his claims from those raised in *Lawrence,* that case is squarely on point with the issues in the instant appeal. CALCRIM No. 226, "like CALJIC No. 2.21.2, ha[s] the purpose of ' "set[ting] out a commonsense principle for evaluating witness credibility." [Citation.]' [Citation.] The instructions 'allow[ ] the jury to disbelieve a witness who deliberately lies about something significant because experience has taught us that a deliberate liar cannot be trusted.' [Citation.]" (*Lawrence, supra,* 177 Cal.App.4th at pp. 554-555.) Contrary to LeBlanc's assertion, his claim *is* merely a matter of semantics. In our opinion the CALJIC statement that a witness's

testimony " ' "is to be distrusted" ' " has exactly the same meaning as the parallel phrase in the CALCRIM instruction: "you should consider not believing anything the witness says." (See *Lawrence* at pp. 553-555, italics omitted.) To "distrust[]" means "To [have] suspicion" (Oxford English Dict. http://www.oed.com. [as of June __, 2012]), in other words, to " 'consider not believing.' " (See *People v. Warner* (2008) 166 Cal.App.4th 653, 657-659.) Thus, assuming LeBlanc had a right to an instruction on this general subject, he had no right to have that instruction delivered using any particular language. (*People v. Ibarra*, *supra*, 156 Cal.App.4th at p. 1188.)

B. Gang Evidence Issues

Defendants individually and jointly raise a plethora of issues regarding the introduction of gang-related evidence at trial. Johnston argues that the trial court abused its discretion in denying the motion to bifurcate the street terrorism charge and gang enhancement from the trial. Johnston further asserts that introduction of some of the gang evidence was testimonial hearsay that violated his right to confrontation under the Sixth Amendment to the federal Constitution. LeBlanc joins in Johnston's arguments and also claims that the gang evidence was improperly admitted at trial because it was: (1) cumulative; (2) irrelevant and improper; (3) hearsay; (4) substantially more prejudicial than probative; and (5) subject to improper comment by the trial court. LeBlanc further asserts that the prosecutor engaged in misconduct by improperly commenting on the evidence during closing argument and that his trial counsel was ineffective for failing to object to such misconduct. Johnston joins in LeBlanc's arguments. We address each issue in turn, after summarizing the relevant procedural and factual background.

1. Background

Sergeant Mario Molina and Sergeant Inspector Edward Yu of the San Francisco Gang Task Force, along with other San Francisco police officers, testified about the gang culture in San Francisco's Mission District. The officers testified about specific gang activities, as well as individual contacts with LeBlanc and Johnston.

a. Gang Culture

There are two primary umbrella gangs in the Mission District, the Norteños (Northerners) and the Sureños (Southerners). The two gangs are rivals, committing violent crimes against each other. The gangs are extremely territorial, each claiming an area and protecting it by force and fear. The dividing line in the Mission District is 22nd Street, ironically with Sureño territory north of that street and Norteño territory being to the south. Alabama Street, which is between 21st and 22nd Streets, is in Norteño territory. In addition to claiming territories, the rival gangs also claim colors—Norteños claim the color red and Sureños claim the color blue. Tattoos are viewed as a sign of pride in gang membership.

Loco North Sides is a subset within the Norteño gang. LNS territory is 24th Street near Mission and Capp Streets. As of November 2006, there were between 35 and 50 members in LNS. Gang members are often known by monikers, which can be symbolic of a character trait or physical feature (or lack thereof).

b. Predicate Acts of LNS

Yu described two predicate acts to establish LNS as a criminal street gang. One act involved a narcotics offense and the other predicate involved an assault.

(i) Narcotics Predicate (Heber Smith)

In April 2004, Heber Smith was arrested for possession of methamphetamine; he was in the company of eight to ten Norteño members. Smith admitted membership in LNS, and he had gang tattoos on his neck and arm. Smith was convicted of possession for sale of methamphetamine. (Health & Saf. Code, § 11378.) Yu believed that the offense was gang-related because it occurred on the 3900 block of Mission Street and because the offense would benefit the gang financially, as well as enhance its reputation.

(ii) Assault Predicate (Walter Bonilla)

In January 2004, Walter Bonilla and other Norteños were arrested at 26th and Mission Streets, after they attacked a blue car being driven on Mission Street. After asking the occupants whether they claimed north or south, Bonilla and the others smashed a window of the car and pulled out the occupants. Bonilla and one of the other

men had gang tattoos; Bonilla was identified as a member of LNS. Bonilla pleaded guilty to felonious assault.

Prior to trial, defendants moved to exclude violent predicate offenses as unduly prejudicial. They cited the assault involving Bonilla as being "particularly inflammatory," as it involved an assault on a family with two children present. Defense counsel argued that this incident—which involved Norteños surrounding a blue car on the mistaken belief that it was a Sureño car and smashing a window and assaulting the four people inside, including two children—was unduly prejudicial. The trial court recognized the potential for prejudice, stating that: "[T]o prove the predicate offenses, you don't need to get . . . much into the facts. . . . [¶] . . . [¶] The assault on the car could be, I suppose, expanded into a horror story if I allowed testimony regarding—I'm just guessing here, but if it is what has been portrayed to me, there was an attack because the car was the wrong color. How severe the attack was . . . I wouldn't propose to allow that, but the basic facts of the assault and conviction establish the predicate crime with additional testimony to show why it's a gang crime." The court added, however, that the underlying facts of the predicate crimes were less inflammatory than the charged offenses. The prosecutor added: "[A]s to the assault, I don't intend to elicit any testimony about there being children in the car. They weren't attacked, by the way. They were cut because there was some flying glass. So, you needn't worry about me playing up the sensational aspect of that assault." Finding the gang evidence relevant to motive and intent, the trial court denied without prejudice the defense motion to limit the predicate offenses to nonviolent crimes.

At trial, defense counsel objected on hearsay grounds when Yu provided the underlying details about the Bonilla incident, which included the following information: "Bonilla . . . and other Norteño gang members attacked a car, a blue colored vehicle that was traveling . . . northbound on Mission Street at 26. [¶] They approached the vehicle, and they asked the people inside whether or not they claimed north or south. The individuals inside did not want to claim any [*sic*] one of the north or south. [¶] They proceeded to throw beer bottles inside the car, jumped on top of the car. They used a

Razor scooter and also smashed a passenger side window with the scooter and proceeded to take the occupants out of the vehicle." At this point, the trial court sustained defense counsel's hearsay objection, adding the following: "I don't think a lot of detail is necessary beyond the fact of the general circumstances of the events. [¶] A car was attacked because it was a blue car and the occupants were assaulted, but the details are not relevant to the reason why I'm allowing you to prove this predicate offense." At defense counsel's request, the court admonished the jury that the evidence "comes in for the limited purpose of showing why the inspector has an opinion this was gang related and why it benefits the gang, and it is a predicate offense to the charge, and it doesn't come in to prove this crime actually was committed."

Yu testified that the Bonilla incident, as well as the one involving Smith, helped to form his opinion that the Norteños, specifically LNS, have engaged in a pattern of criminal activity. Yu explained that an attack like the Bonilla incident, committed in Norteño territory, instills fear in the community.

The prosecutor then described a 20-page packet of information, marked as exhibit 103, which included: a commitment order, "a single page of generic minutes reflecting a change of plea[,]" an 11-page felony plea transcript, and a four-page document regarding the conditions of Bonilla's probation. Defense counsel objected "particularly to the complaint, the sentence and the . . . special conditions of probation." The trial court overruled the objection on the grounds that the documents in exhibit 103 established the basis for Yu's opinion and that the documents were not otherwise excludable under Evidence Code section 352.

A three-page criminal complaint regarding the Bonilla incident was included in exhibit 103. The complaint charged Bonilla with several crimes, including two counts of "wil[l]fully and unlawfully inflict[ing] cruel and inhuman corporal punishment and injury resulting in a traumatic condition upon a child [§ 273d], to wit: E[.] M., DOB 4-12-99" and "H[.] M., DOB 5-1-01."

c. Personal Involvement

Various criteria are used to determine gang membership status: self-admission, gang-related tattoos, arrests for gang-related crimes, association with known members, presence in gang turf, correspondence with members in custody, informant tips, wearing gang colors, flashing gang signs, and gang-related photographs.

(i) Contacts with Johnston

Molina testified that, starting in 1999, he had investigated Johnston on at least three prior occasions for narcotics offenses. In a 1999 incident, Johnston was wearing red and selling narcotics in the Tenderloin, which is primarily Sureño territory. Molina believed that it was a sign of defiance to wear red in Sureño territory. Although Yu believed this conduct was dangerous, he did not think it was done for the benefit of the Norteño gang.

Officer Peter Richardson arrested Johnston in October 2000 for selling rock cocaine at the corner of Treat and 24th Streets. Richardson testified that he had known Johnston for several years, had seen him with Norteño members, and had previously arrested him. He further testified that Johnston had admitted he was a Norteño member in 1999 and 2000; Richardson also had observed Johnston wearing gang colors.

Yu was aware of Johnston's prior drug arrests in 1999 and 2000; Yu also knew of two additional drug arrests occurring in 2002 and 2004. Additionally, during a November 2004 parole search of Johnston's bedroom, officers located several items of gang paraphernalia, including red bandanas and photographs with gang members.

Yu believed that Johnston was a member of LNS because of his self admission, tattoos, and criminal history. Yu opined that Johnston was a "shot caller"—i.e., a more experienced gangster who directed junior members' actions; Johnston was seven to nine years older than LeBlanc.

(ii) Contacts with LeBlanc

In June 2005, Molina interviewed LeBlanc at the Youth Guidance Center (YGC), after a Sureño member had assaulted LeBlanc while he was detained at the YGC. LeBlanc admitted he was an LNS member, going by the name Crazy Teño. Molina

believed the assault at the YGC was gang-related because the assailant was motivated by LeBlanc's membership in a rival gang.

Some time after the YGC interview, police detained LeBlanc and other Norteños as witnesses to a Mission District shooting of a Norteño victim by a Sureño; the Norteños wore red. LeBlanc had arrived at the scene after the shooting and was not a suspect. Then, in November 2005, LeBlanc was arrested along with another Norteño for vehicle theft and stolen vehicle possession.

In January 2006, an LNS member was the victim of a shooting in which LeBlanc was also shot at; LeBlanc drove the victim to the hospital, where he admitted his LNS membership to Yu. LeBlanc stated that he had been a member of LNS for six years. Over the next three months, while in jail on an unrelated offense, LeBlanc wrote three letters to Norteño member Vinicio Vasquez; they included LNS and personal references.

As of November 2006, Lopez knew LeBlanc to be an LNS member. On the night of the Urzua crime, LeBlanc was wearing some gang-related clothing (e.g., red and white shoes); Johnston had a red handkerchief in the back pocket of his pants. After arresting the defendants, police found a digital camera in the glove compartment of Johnston's car that had stored images of LeBlanc wearing red clothing and displaying gang-related hand signs and tattoos.

At some point while in jail, LeBlanc acquired a huelga bird tattoo on his neck. According to San Francisco County Sheriff Department Lieutenant Fernando Velasco, who had worked in the intake unit at the county jail, in the Norteño culture such a tattoo is reserved for members who are more educated about the gang's philosophy and rules and have put in more active work—such as a serious, violent crime—on its behalf. It shows dedication. Yu believed LeBlanc could have earned the tattoo by stabbing someone he mistook for a Sureño. Based on LeBlanc's self admission, tattoos, and criminal history, together with the Urzua homicide evidence, Yu believed LeBlanc was an LNS/Norteño member.

Yu opined that the Norteño gang would benefit from killing a perceived rival because its members would gain notoriety, and the act would enhance the gang's

reputation for being violent, further instilling fear in the community. Yu believed that the facts of the underlying offense were consistent with it being committed for the benefit of the Norteños. Although he did not believe that the victim was a gang member, Yu still believed that the crime was committed for the benefit of the Norteños. Yu opined that this was a gang hit with the intent to hurt or kill someone.

2. Bifurcation

Before trial, defendants moved to bifurcate trial of the street terrorism charge (§ 186.22, subd. (a)) and gang enhancements (§ 186.22, subd. (b)(1)) from the murder and robbery charges. The trial court denied the motion, finding that evidence of prior narcotics sales was "hardly inflammatory." The court, however, acknowledged that there was a potential for undue prejudice regarding the attack on the car—the predicate act committed by Bonilla—but assured the parties that only the basic facts of the assault and the fact of the conviction would be used to explain why it was a gang crime. The court concluded that the facts of the instant case were "an urban nightmare"—i.e., where a victim is stabbed to death on his doorstep—such that evidence of the narcotics sale (Smith offense) and the assault (Bonilla offense) were not inflammatory in comparison. Defense counsel argued that by adding the gang allegations to the frightening facts of this case it would be "scarier than your regular urban nightmare." The prosecutor stated that, as to the Bonilla assault, he did not intend to elicit any testimony about there being children in the car or that they were cut by flying glass.[5]

Johnston, joined by LeBlanc, argues that the trial court erred in denying the defense motions to bifurcate the gang charge and gang enhancements, as the gang evidence was unduly inflammatory and it resulted in a conviction based on a theory of "guilt by association." Johnston argues that the trial court's ruling "created great prejudice," and resulted in the denial of due process and fair trial. We review a trial court's denial of a request to bifurcate for abuse of discretion (*People v. Hernandez*

[5] In his testimony at the preliminary hearing, Yu described the Bonilla predicate offense as involving child passengers, who were cut by shattered glass from a broken window, after the adult occupants were attacked.

(2004) 33 Cal.4th 1040, 1048 (*Hernandez*)) and find no abuse of discretion in the instant case.

Section 1044[6] gives a trial court wide discretion to bifurcate proceedings. (*People v. Calderon* (1994) 9 Cal.4th 69, 74-75.) The Supreme Court has distinguished between a prior conviction allegation, which relates to the defendant's status and may have no connection to the charged offense, and a criminal street gang allegation, which "is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*Hernandez, supra,* 33 Cal.4th at p. 1048.) There is generally less need for bifurcation of a gang enhancement than of a prior conviction allegation. (*Ibid.*)

The party seeking bifurcation has the burden to "clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People v. Bean* (1988) 46 Cal.3d 919, 938.) No such substantial danger of prejudice was shown here. We agree with the trial court that the evidence of the narcotics sales was "hardly inflammatory" in the instant case. Additionally, the evidence regarding gang contacts, such as self-admissions, gang clothing, associating with other gang members, frequenting gang areas, gang tattoos, flashing gang signs, possession of gang paraphernalia, and making gang comments, was certainly less inflammatory than the evidence regarding the brutal stabbing death of an innocent man. To the extent the Bonilla incident had the potential for prejudice, it was, nevertheless, relevant and admissible as the "very reason for the underlying crime, that is the motive, [was] gang related." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168; see also *People v. Williams* (1997) 16 Cal.4th 153, 193-194 [gang evidence relevant to prove motive where gang member killed someone mistakenly perceived to be a rival].)

---

[6] Section 1044 provides: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

Our Supreme Court recognized in *Hernandez, supra,* 33 Cal.4th 1040 that bifurcation may be appropriate in cases where, for example, gang evidence is "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Id.* at p. 1049.) Here, none of the gang evidence, including the Bonilla predicate act, could be described as "so extraordinarily prejudicial" and of such "little relevance" to the charged offenses. (*Ibid.*)

Because it was clear that the evidence was limited to prove the gang allegations and substantive gang offense—not to prove that defendants had a propensity to commit crimes—there was no risk of confusion with collateral matters. We find no strong support for bifurcation and accordingly find no abuse of discretion.

3. Expert Testimony Regarding Basis Evidence

In testifying as a gang expert for the prosecution, Yu opined, inter alia, that LNS was a criminal street gang and that Johnston had been a high-ranking member or "shot caller" of LNS at the time he committed the charged offenses. As basis evidence to support his opinion, Yu relied, in part, on the Bonilla evidence, which consisted of various minute orders and the plea agreement regarding the attack on the blue car. Yu also described a 2004 parole search of Johnston's residence that revealed a shotgun.

Defendants argue that admission of the Bonilla evidence and the shotgun evidence violated their confrontation rights under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).[7] They argue that this evidence was testimonial hearsay and effectively offered for its truth because: (1) Yu relied on it to support his opinion that LNS was a criminal street gang and Johnston was an active, high-ranking member; and (2) the jury

[7] Johnston made an in limine motion to exclude gang expert testimony on hearsay grounds and reasserted this challenge in his motion for new trial. LeBlanc joined in Johnston's motion for new trial.

was instructed to consider the "truth" of the information on which Yu relied in evaluating the weight of his opinion. (See CALCRIM No. 332.)[8]

Though we agree that the challenged evidence was testimonial, and that the jury was instructed to consider the "truth of the information" in evaluating Yu's opinion, under *Crawford, supra,* 541 U.S. 36 and subsequent case law, out-of-court testimonial statements do not violate the confrontation clause when they are admitted solely as basis evidence to support an expert opinion and not as substantive or independent evidence of the truth of the matter asserted. (See *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427 [expert's reliance on hearsay reports in forming opinion that predicate crimes were committed for the benefit of a gang did not violate confrontation clause]; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210 [no *Crawford* error where expert subject to cross-examination about opinions and materials relied on are not elicited for the truth of their contents, but to assess weight of expert's opinion].)

In *People v. Hill* (2011) 191 Cal.App.4th 1104, 112-1131, a different panel of this court critiqued the distinction made in *People v. Thomas*, *supra,* 130 Cal.App.4th 1202 between out-of-court statements offered for their truth and those relied upon by an expert as the basis for his or her opinion. The panel noted that "where basis evidence consists of an out-of-court statement, the jury often will be required to determine or assume the truth of the statement in order to utilize it to evaluate the expert's opinion." (*Id.* at p. 1131.) *Hill* concluded, nonetheless, that the distinction between basis evidence and substantive evidence was dictated by *People v. Gardeley* (1996) 14 Cal.4th 605 and other Supreme Court precedents. (*Hill* at p. 1127, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) It therefore rejected the defendant's claim that the gang expert should not have been permitted to describe the out-of-court statements supporting his opinion during his testimony before the jury. (*Hill* at pp. 1127-1128.)

---

[8] Defendants argue that CALCRIM No. 332—which requires the jury to determine whether the information on which the expert relied was true and accurate—contradicted CALCRIM No. 360—which advises the jury that statements made by people other than the defendants to the experts were not admitted for their truth.

We agree with *Hill* that it is often difficult if not practically or logically impossible for juries to disregard the truth of hearsay evidence when offered as basis evidence to expert opinion. (*Hill, supra,* 191 Cal.App.4th at pp. 1129-1131.) Nevertheless, like *Hill* we are bound to follow *People v. Gardeley, supra,* 14 Cal.4th 605 and apply its distinction between basis evidence and hearsay evidence offered for its truth. Inasmuch as California Supreme Court precedent compels the result reached by the trial court, we affirm its ruling. (*Hill* at p. 1137.)

4. The Bonilla Predicate Crime

In a related argument, defendants argue that the only evidence that should have been admitted was the fact of Bonilla's conviction for assault. They assert that the evidence regarding the conduct underlying the crime was prejudicially cumulative, which became even more inflammatory due to an improper judicial comment and prosecutorial misconduct during the closing argument.

a. Cumulative Evidence

Defendants acknowledge that the fact of Bonilla's assault conviction was properly admitted to prove he committed a predicate crime on behalf of LNS. (See § 186.22 [substantive gang crimes and enhancements require proof that group was "criminal street gang," shown in part by gang member's commission of enumerated offenses].) Defendants assert, however, that only the fact of the conviction should have been admitted because it was sufficient to show the fact of a predicate crime. According to defendants, Yu's testimony that the crime was committed on behalf of the gang, and the information contained in exhibit 103, were cumulative evidence that was so inflammatory that it altered the outcome of the trial. Overlooking the fact that defendants did not object on these grounds at trial, the argument nevertheless fails on the merits.

The challenged evidence was relevant to prove the prosecution's case. The burden of proving the gang enhancement beyond a reasonable doubt requires, in part, proof of a "pattern of criminal gang activity." (§ 186.22, subds. (e) & (f); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) The prosecution proves a pattern of criminal gang activity by showing the commission or attempted commission of, or conviction for "two or more"

enumerated predicate offenses "committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e); *People v. Loeun* (1997) 17 Cal.4th 1, 4.) The prosecution must also prove that commission of crimes is one of the "primary activities" of the gang. (§ 186.22, subd. (f).) Proof that commission of the enumerated crimes is a primary activity of the gang generally consists of evidence that the group's members consistently and repeatedly commit crimes enumerated in the gang statute. (*Sengpadychith* at p. 324.)

Although relevant, evidence of an excessive number of predicate offenses may be excluded as cumulative under Evidence Code section 352 if the prejudicial effect of admission substantially outweighs the probative value of the evidence. (*Hernandez, supra*, 33 Cal.4th at pp. 1049-1050; *People v. Albarran* (2000) 149 Cal.App.4th 214, 223-224.) While "no bright-line rules exist for determining when evidence is cumulative, we emphasize that the term 'cumulative' indeed has a substantive meaning, and the application of the term must be reasonable and practical." (*People v. Williams* (2009) 170 Cal.App.4th 587, 611.) A trial court's ruling on the admission of gang testimony is reviewed for abuse of discretion and will be upheld unless it was arbitrary or capricious. (See, e.g., *People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

Here, there was no abuse of discretion. Contrary to defendants' contention, the prosecutor did not " ' "over-prove" ' " his case by presenting cumulative evidence. Unlike in *People v. Williams, supra,* 170 Cal.App.4th 587 cited by defendants, the prosecutor did not present evidence of numerous predicate crimes. Rather, the prosecutor merely presented the fact of Bonilla's conviction, as well as the underlying conduct of the conviction. Since 1996 the prosecution has been able to establish the predicate offenses "by a showing of the fact of convictions, rather than proof of the underlying conduct." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1461, fn. 5.) However, the methods for proving predicate offenses are not mutually exclusive. Indeed, as defendants acknowledge, the 1996 statutory amendment to section 186.22 served to ease the prosecution's burden by allowing predicate offenses to be proved by the fact of the convictions. (*Duran* at p. 1461, fn. 5.) We fail to see, however, how this change limited the prosecutor's ability to prove the predicate offense by both the fact of the conviction

and underlying conduct. In any event, the trial court retains discretion to admit both the fact of the conviction and the underlying conduct. (See *People v. Tran* (2011) 51 Cal.4th 1040, 1049.)

Finally, the evidence concerning predicate offenses was no more inflammatory than the testimony about the charged offenses. In addition, the admitted testimony did not necessitate an undue consumption of time or pose a risk of confusing the jury.

b. Judicial Commentary

Defendants argue that the trial court's summary of the Bonilla incident misstated the evidence. The challenged statement is as follows: "A car was attacked because it was a blue car and the occupants were assaulted. . . ." According to defendants, the court improperly commented on the evidence because (1) there was no evidence the Norteños attacked the car because it was blue, and (2) there was no evidence the Norteños "assaulted" the passengers.

Notwithstanding the fact that defendants never objected to the court's statement, the argument on appeal fails on the merits. A trial court has "broad latitude in fair commentary, so long as it does not effectively control the verdict." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 768.) Provided the court does not "comment, in any manner, *upon the guilt of the accused*," it may "discuss[] and analyze[] the evidence in an impartial and instructive manner." (*People v. Foster* (1971) 19 Cal.App.3d 649, 657, italics added.)

In the instant case, the trial court did not comment in any way on the guilt of the defendants. Rather, in response to an objection, the court merely summarized the evidence in a brief, objective manner. Although it is true that Yu did not testify that the Norteños attacked the car *because* it was blue, on the facts of this case it was an entirely fair comment on the evidence because: (1) it is beyond dispute that Norteños claim the color red and Sureños claim the color blue; (2) the blue car was driven in an area described as Norteño territory; and (3) the Norteños asked the occupants whether they "claimed" the north (Norteños) or the south (Sureños). The Norteños then threw beer bottles inside the car, jumped on top of the car, and used a scooter to smash a window in the car; the Norteños took the occupants out of the car and were later charged with

assault. Certainly the trial court did not misstate the evidence when it referred to the occupants being assaulted. Finally, the trial court's brief statement was hardly inflammatory in the context of the brutal nature of the charged offenses.

c. Evidence Code Section 352

Defendants maintain that the Bonilla evidence should have been excluded because "most" of it was "more prejudicial than probative." (Italics and initial capitals omitted.) For Evidence Code section 352 purposes, " 'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that ' "uniquely tends to evoke an emotional bias against defendant without" ' regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) The Bonilla evidence, tending as it did to prove that Norteños were willing to assault perceived rivals in their territory, was relevant and thus damaging to defendants on the issue of whether they killed Urzua because he was a perceived rival in Norteño territory. "To hold that the evidence was excludable as 'prejudicial' would be to hold that evidence may be barred because it is too relevant." (*People v. Yu* (1983) 143 Cal.App.3d 358, 377, italics omitted.) Finally, the evidence was presented in a brief, straightforward manner that did not invoke an emotional bias against the defendants.[9]

d. Prosecutorial Misconduct

During closing argument, the prosecutor in his concluding remarks discussed the gang enhancement: "[O]ne of the things I have to show is that this is a criminal street gang and the way you show that is you have to show that some of the requisite predicate offenses occurred. That's what the testimony about Heber Smith was about and his conviction, felony conviction for possession of methamphetamine for sale. [¶] That's what the discussion with [*sic*] Walter Bonilla was about. You heard he was part of the group of Norteños that dragged that family out of a car and beat them up just because the

[9] Defendants make much of the fact that the jury learned that children were involved in the assault. However, neither the trial court nor the parties mentioned the fact that children had been victims of the assault. Rather, the only brief reference came in the form of the felony complaint.

car was blue. [¶] . . . Those two offenses show the pattern of two or more offenses. That's one of the requirements that the judge gave you for a criminal street gang. That's why you have that evidence. [¶] But the Walter Bonilla thing shows you something about the unreasoning character of gangsters. The Walter Bonilla crime shows you that these arrogant guys think that somehow their petty considerations, their petty feud with their perceived rivals is something that we're all kind of in on one way or another. [¶] For the victims in the Walter Bonilla case, these were just people driving at 26th and Mission who happened to be in a blue car. [¶] The arrogance of the gang mentality, the recklessness of the gang mentality is that they actually think that adults go out there and purchase a car and select the color of the car with their petty rivalries in mind; that people who know nothing about Norteños and Sureños pick their car color to weigh in on this feud." Neither defendant's counsel objected to these comments.

Defendants contend that the prosecutor committed misconduct during closing argument when he stated that Bonilla and the Norteños "dragged that family out of a car and beat them up just because the car was blue." According to defendants, by this statement, the prosecutor breached his promise not to play up the " 'sensational aspect' " of the assault. They further claim the prosecutor misrepresented the facts because there was no evidence that Bonilla "dragged" the family out the car and "beat" them up. Defendants also assert that the challenged statement was essentially a false claim, because the prosecutor knew that the children were not attacked. Additionally, defendants claim the prosecutor improperly relied on bad character evidence, which went beyond the trial court's limited admissibility ruling, when he argued: "The Walter Bonilla thing shows you something about the unreasoning character of gangsters. The Walter Bonilla crime shows that these arrogant guys think that somehow their petty considerations, their petty feud with their perceived rivals is something that we're all kind of in one way or another. [¶] . . . [¶] The arrogance of the gang mentality, the recklessness of the gang mentality is that they actually think that adults go out there and purchase a car and select the color of the car with their petty rivalries in mind. . . ."

First, we find defendants forfeited any claim of prosecutorial misconduct by failing to object on the grounds raised here. " ' "[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" ' [Citation.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 157, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Thus, " '[t]o preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.' [Citations.]" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215; see also *People v. Riggs* (2008) 44 Cal.4th 248, 298-299; *People v. Crittenden* (1994) 9 Cal.4th 83, impliedly overruled on other grounds as stated in *People v. Baldwin* (2010) 189 Cal.App.4th 991, 999-1000.) Defendants have not made any showing that any harm from the fleeting comments of the prosecutor could not be sufficiently cured by an admonition.

Alternatively, defendants argue that if we conclude this claim is forfeited, reversal nonetheless is required because trial counsel rendered ineffective assistance for failing to lodge a proper objection. The standard for establishing ineffective assistance of counsel is well settled. In *People v. Pope* (1979) 23 Cal.3d 412, 424, the California Supreme Court set out a two-step test for determining the adequacy of counsel: "[The defendant] must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition, [the defendant] must establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense." (*Ibid.*, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10 (overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1).) Thus, defendants' ineffective assistance of counsel claim will prevail only if they can establish deficient performance, i .e., representation below an objective standard of reasonableness and resultant prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "If a defendant has failed to show that the challenged actions of

counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. [Citation.]" (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1008, disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) We turn directly to the question of prejudice.

When the claim of prosecutorial misconduct focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) When conducting this inquiry, the court " 'do[es] not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citation.]" (*Ibid.*) Furthermore, it is defendants' burden to demonstrate that the prosecutor's alleged misconduct " 'comprise[d] a pattern of conduct "so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process." [Citation.]' " (*People v. Gionis, supra,* 9 Cal.4th at pp. 1214-1215.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' " ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " ' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 215-216, citing *People v. Hill, supra,* 17 Cal.4th 800, 819.)

Here, the prosecutor engaged in no such deceptive or reprehensible methods in an effort to persuade the jury. At most, the brief comment about "dragging" the family out of the car and beating them up was an inference drawn from the evidence at trial, which was well within the wide latitude afforded to prosecutors during closing argument. (*People v. Lucas* (1995) 12 Cal.4th 415, 473.) Similarly, we do not agree with defendants that the comments about the "unreasoning character of gangsters" constituted misconduct. Nor do we agree that there was any danger that the comments affected the jury's determination of the case. The evidence of defendants' guilt was strong. The jury heard evidence that Johnston was the "shot caller," who ordered his subordinates to get out of the car and " 'get' " Urzua, calling him "a south side" and a " 'scrap.' " LeBlanc

was identified by Lopez as challenging the victim, asking him, "Where you from, where you from?" and then repeatedly stabbing him. Defendants then fled the scene and later returned. When apprehended, LeBlanc, who was covered in blood, gave a false name, and was found in possession of the victim's cell phone. Given this evidence, we conclude that defendants have not made an adequate showing that the statements they challenge prejudiced their trial and the jury's verdict.

C. DNA Evidence

At trial, the prosecution sought to admit DNA evidence collected from LeBlanc's clothing and from the scene. Because the two analysts who tested the evidence were not available to testify, the prosecution sought to introduce the evidence from the testimony of the supervising DNA analyst. The trial court overruled LeBlanc's objection that the evidence was inadmissible under *Crawford, supra,* 541 U.S. 36 and violated his constitutional right to confront and cross-examine witnesses.

Matthew Gabriel, a supervising DNA analyst for the San Francisco Police Department's forensic division, testified about the test results revealing that Urzua's blood was on LeBlanc's clothing and LeBlanc's own blood was also on his clothing, and confirming that the blood on the sidewalk at the crime scene was attributable to Urzua. Gabriel explained that when the DNA samples arrived from the crime scene, he selected the samples to be tested and chose the level of testing the samples would receive. Gabriel then assigned the testing to two analysts. Gabriel explained the multistep testing process as follows: one analyst performs the DNA examination, generating data and reaching conclusions; a second analyst looks at the data generated by the first test and arrives at a similar conclusion; the data is compiled into a report. The report and underlying data are then submitted to Gabriel for technical and administrative review. As a supervisor, Gabriel looks at the underlying data and also verifies that the report is written properly.

LeBlanc, joined by Johnston, contends the trial court violated his Sixth Amendment right to confrontation by permitting the DNA supervisor to testify regarding the procedures and reports of the nontestifying analysts involved in the DNA testing in this case. He asserts that the trial court's authority for admitting the evidence, *People v.*

Geier (2007) 41 Cal.4th 555 (*Geier*), does not survive the recent United States Supreme Court decisions in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527] (*Melendez-Diaz*) and in *Bullcoming v. New Mexico* (2011) 564 __ U.S. [131 S.Ct. 2705] (*Bullcoming*)).

In *Geier*, a laboratory director testified that DNA extracted from the victim's body matched defendant's DNA. (*Geier, supra,* 41 Cal.4th at pp. 593-594.) The director supervised the analyst who conducted the DNA test and relied upon the analyst's DNA report when testifying. (*Id.* at pp. 594-596.) The California Supreme Court held that the DNA report was not testimonial. (*Id.* at p. 608.) The court noted that forensic evidence, such as a laboratory report, "represents the contemporaneous recordation of observable events" made " 'during a routine, non-adversarial process meant to ensure accurate analysis.' " (*Id.* at p. 607.) "Records of laboratory protocols followed and the resulting raw data are not accusatory." (*Ibid.*)

After *Geier, supra,* 41 Cal.4th 555 was decided, the United States Supreme Court held in *Melendez-Diaz, supra,* 129 S.Ct. 2527 that the Sixth Amendment precluded the prosecution from introducing into evidence at trial affidavits, sworn to by government laboratory analysts before a notary public, showing that forensic analysis of a seized substance determined it was cocaine. (*Id.* at pp. 2531-2532.) The Supreme Court held the affidavits were testimonial statements because they were the functional equivalent of live, in-court testimony and were "made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." (*Ibid.*) Additionally, the Court concluded the analysts were accusatory witnesses because the affidavits proved facts necessary to the prosecution's case. (*Id.* at pp. 2533-2534.) Thus, the Court implicitly rejected much of the reasoning in *Geier* that reports of DNA testing are not testimonial, including its explanation that the " 'near-contemporaneity' " of the analysts' observations and recording of events eliminated any Sixth Amendment concerns. (*Melendez-Diaz* at p. 2535.)

In California, the intermediate appellate courts have disagreed whether *Geier, supra,* 41 Cal.4th 555 remains good law after *Melendez-Diaz, supra,* 129 S.Ct. 2527 and

have reached conflicting opinions that are now under review by our Supreme Court. (See *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213 [testimony of supervising criminalist as to result of drug tests and report prepared by another criminalist held admissible]; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886 [testimony of one pathologist as to manner and cause of death in murder case based upon autopsy report prepared by another pathologist held inadmissible]; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046 [blood-alcohol level test report prepared by a criminalist who did not testify at trial held inadmissible]; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620, argument limited to issues of denial of Sixth Amendment rights [testimony by one nurse practitioner as to the results of sexual assault examination and report prepared by another nurse practitioner held admissible except for victim's narrative, and testimony by supervising criminalist as to the result of DNA tests and report prepared by another criminalist held admissible].)

While the instant appeal was pending, the United States Supreme Court issued its decision in *Bullcoming.* In *Bullcoming* the defendant was charged with driving while intoxicated (DWI). (*Bullcoming v. New Mexico, supra,* 131 S.Ct. at p. 2709.) The principal evidence against the defendant was a forensic laboratory report certifying that the defendant's blood-alcohol concentration was well above the threshold for an aggravated DWI. (*Ibid.*) At trial the prosecution did not call the technician who signed the certification. (*Ibid.*) Instead, the prosecution called another analyst who was familiar with the laboratory's procedures but had neither participated in nor observed the test on the defendant's blood sample. (*Ibid.*) The Court held the "in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification" did not satisfy the Sixth Amendment right to confrontation. (*Id.* at pp. 2710, 2713.) "The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." (*Id*. at p. 2710.)

Ultimately, the California and United States Supreme Courts will resolve the issue of the admissibility of DNA reports prepared by analysts who do not testify at trial. We need not express an opinion on the matter because any error in admitting the DNA evidence here was harmless. Confrontation clause violations are subject to federal harmless error analysis. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2542, fn. 14; *Geier, supra,* 41 Cal.4th at p. 608.) " '[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' [Citation.] The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' " (*Geier, supra,* 41 Cal.4th at p. 608.) On the instant record, there is no such doubt.

As the Attorney General ably demonstrates on appeal, the DNA evidence was largely cumulative of properly admitted evidence at trial. While the DNA evidence was used to connect LeBlanc to the stabbing death of Urzua, Lopez testified that the unidentified man in black handed LeBlanc a knife, that LeBlanc stabbed Urzua, and that only LeBlanc stabbed Urzua. Although LeBlanc asserts that Lopez's testimony was not credible, the jury presumably found Lopez's testimony to be credible by convicting LeBlanc on all counts submitted to it for resolution. As witness credibility is within the sole province of the trier of fact, we will not reassess this issue on appeal. (*People v. Jones* (1990) 51 Cal.3d 294, 314-315.) With or without the DNA evidence, the jury would have surmised that the blood covering LeBlanc's clothes, as well as the blood found in the car and at the scene, belonged to Urzua. Lopez testified that he saw Urzua push past LeBlanc as he ran down the stairs. Indeed, in closing argument, defense counsel, relying on Lopez's testimony, argued that it was possible that Urzua's blood was transferred to LeBlanc's clothing as Urzua ran away. Likewise, DNA evidence was hardly necessary to establish that the blood stains on the stairs and the sidewalk belonged to Urzua. It is undisputed that Urzua was bleeding profusely at the scene.

Finally, to the extent that the DNA evidence established that LeBlanc's own blood was on his shorts, this evidence was similarly unnecessary. Lopez saw LeBlanc

wrapping his hand with a shirt to stop the bleeding. Additionally, the arresting officers observed that at the time of his arrest, shortly after the murder, LeBlanc had a fresh wound to his hand. LeBlanc's wound was described as being consistent with an offensive stab wound. This independent evidence not only explains the presence of LeBlanc's own blood on his clothing, it also connects LeBlanc to the stabbing.

Accordingly, we conclude that any constitutional error in admitting the DNA evidence was harmless beyond a reasonable doubt.

D. Cumulative Error

Claiming that the cumulative effect of the errors they have identified on appeal deprived them of a fair trial, LeBlanc and Johnston contend that the judgment should be reversed on that basis. Having reviewed the record and rejected defendants' arguments as set forth above, we disagree. (*People v. Kipp* (1998) 18 Cal.4th 349, 383 [issues raised on appeal did not singly or cumulatively establish prejudice requiring reversal of convictions].)

E. Sentencing

Lastly, we consider whether defendants were properly punished for both street terrorism and the felonious conduct underlying that offense, i.e., the robbery (LeBlanc only) and the murder (LeBlanc and Johnston) of Urzua. Defendants contend the multiple punishment prohibition in section 654 mandates that their sentences for street terrorism be stayed, and we agree.

The jury convicted defendants of street terrorism under section 186.22, subdivision (a), which states: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any *felonious criminal conduct* by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." (Italics added.) "[S]ection 186.22[, subdivision] (a) imposes criminal liability not for lawful association, but only when a defendant 'actively participates' in a criminal street gang while also aiding and abetting a felony offense

committed by the gang's members." (*People v. Castenada* (2000) 23 Cal.4th 743, 750-751.)

Defendants claim the court erred by failing to stay their sentences for street terrorism pursuant to section 654. Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "Although section 654 speaks in terms of an 'act or omission,' it has been judicially interpreted to include situations in which several offenses are committed during a course of conduct deemed indivisible in time. [Citation.]" (*People v. Meeks* (2004) 123 Cal.App.4th 695, 704.) " 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not more than one.' [Citation.]" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952, italics added.)

"The purpose of [section 654's] protection against punishment for more than one violation arising out of an 'act or omission' is to insure that a defendant's punishment will be commensurate with his culpability. [Citation.] 'Because of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an "act or omission," there can be no universal construction which directs the proper application of section 654 in every instance.' [Citations.]" (*People v. Perez* (1979) 23 Cal.3d 545, 550-551, 153.)

As such, some intermediary courts have determined section 654 precludes punishment for both street terrorism and the underlying felony. (See, e.g., *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1315.) However, some courts have found section 654 inapt on the basis the mens rea for street terrorism—the intent to participate in a criminal street gang—is not inherent in the underlying felony. (See, e.g., *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466-1468; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935.) The Attorney General urges us to follow *Herrera* and its

progeny, but doing so does not lead to the conclusion that separate punishment was justified in this case.

According to the Attorney General, defendants harbored three separate intents and objectives with respect to the murder: (1) to kill Urzua; (2) to enhance the gang's reputation within the community; and (3) to enhance their personal status within the gang. As for the robbery, the Attorney General argues that LeBlanc possessed three separate intents: (1) to rob Urzua; (2) to benefit himself; and (3) to benefit the gang.

While the instant appeal was pending, the California Supreme Court issued its decision in *People v. Mesa* (June 4, 2012, S185688) __ Cal.4th __ [2012 WL 1970864], which expressly disapproved of *People v. Herrera, supra*, 70 Cal.App.4th 1456, to the extent that case purports to impose multiple punishment based on multiple criminal objectives, where, as here, the multiple convictions at issue were indisputably based upon a single act. The so-called separate intents and objectives in the instant case were inextricably linked to the overarching objective of the attack, which was to promote/benefit defendants' gang. And in finding the gang allegations true, the jury specifically determined the murder and robbery were committed to benefit defendants' gang. Therefore, we find unpersuasive respondent's attempt to parse out separate intents and objectives in this case. Because the street terrorism offense and the underlying felonies were carried out against a single victim during a single criminal episode, and because the crimes were part and parcel of a core objective to promote defendants' gang, section 654 applies here to prohibit punishment on the street terrorism counts. (*Mesa, supra,* __ Cal.4th __ [2012 WL 1970864].)

Accordingly, the trial court must stay execution of sentence for defendants' street terrorism convictions pursuant to section 654.

III.
DISPOSITION

As to defendant LeBlanc, the trial court is directed to modify the judgment to stay the three-year sentence for street terrorism (count III) and amend the abstract of judgment accordingly. The trial court is further directed to correct the abstract of judgment to

include the gang enhancement for murder (count I), which the jury found true and for which the court imposed a 10-year stayed sentence.

As to defendant Johnston, the trial court is directed to modify the judgment to stay the concurrent three-year sentence for street terrorism (count III) and amend the abstract of judgment accordingly. The trial court is further directed to correct the abstract of judgment to include the gang enhancement for murder (count I), which the jury found true and for which the court imposed a 10-year stayed sentence.

The trial court shall forward to the Department of Corrections and Rehabilitation amended abstracts of judgment for each defendant.

In all other respects the judgments are affirmed.

_____
Sepulveda, J.*

We concur:

_____
Ruvolo, P. J.

_____
Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

People v. LeBlanc (A126458)